NA 04-0169-C H/H Lopez v IN/KY Electric
Judge David F. Hamilton Signed on 8/17/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ELIAS LOPEZ,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:04-cv-00169-DFH-WGH
	)	
INDIANA-KENTUCKY ELECTRIC CORPORATION,	)	
	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ELIAS LOPEZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CASE NO. 4:04-cv-0169-DFH-WGH
INDIANA-KENTUCKY ELECTRIC CORPORATION,	)	
	)	
	)	
Defendant.	)	

ENTRY ON MOTION FOR SUMMARY JUDGMENT

Elias Lopez, a native of Mexico, has brought this suit against his employer Indiana-Kentucky Electric Corporation ("IKE"), claiming that defendant discriminated against him because of his race and national origin, subjected him to a hostile work environment, and retaliated against him for reporting discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981. IKE denies all of Lopez's allegations and filed a motion for summary judgment as to each claim. IKE argues that Lopez's claims are untimely, that they exceed the scope of his complaint before the Equal Employment Opportunity Commission ("EEOC"), and that Lopez does not have sufficient evidence on the merits of his claims. For the reasons explained below, IKE's motion is granted in part and denied in part. Some of Lopez's claims run into legal obstacles specific to Title VII, but his Section 1981 claims survive on the

merits because he has come forward with a sufficient mosaic of circumstantial evidence of differential treatment and hostility toward his Mexican origin and Spanish accent.

Summary Judgment Standard

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not a "paper trial." *Waldridge v. American Hoeschst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Only genuine disputes over material facts can prevent a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine only if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.*

When deciding a motion for summary judgment, the court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light reasonably most favorable to the non-moving party. See Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 255; *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999). However, a party must present more than mere speculation or conjecture to defeat a summary judgment motion. The issue is whether a reasonable jury might rule in favor of the non-

moving party based on the evidence in the record. *Anderson*, 477 U.S. at 252; *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 637 (7th Cir. 2001).

Facts for Summary Judgment

IKE hired Lopez, who was born in Mexico, as a laborer at its Madison, Indiana power plant in 1991. After six months, IKE promoted Lopez to a position as a utility worker. IKE promoted him to a position as a utility operator on C shift in 1994. Lopez worked in the Operations Department, which employed utility operators as well as eight Auxiliary Equipment Operators, four Equipment Operators, six Unit Supervisors, two Assistant Shift Operating Engineers, and one Operating Engineer who supervised the shift. In 1997, Lopez became an Auxiliary Equipment Operator ("AEO").

In 1997, Lopez was moved to B shift under supervisor Paul Reed. Lopez testified that Reed began to train another employee with less seniority than Lopez, Patrick Lynch, for an Equipment Operator ("EO") position. After Lopez threatened to file a grievance, Lopez testified, Reed began to train Lopez for an EO position as well. Lopez testified that he observed Reed assigning Lynch to perform many functions that Lopez was not trained to perform and that Reed "put no interest" in Lopez's training. Lopez Dep. at 99.

IKE policy states that in promoting an employee from one classification to another in a "line of promotion," consideration is given to (1) skill, ability,

efficiency, experience, and training; and (2) physical capacity to perform the job. Where an employee satisfies the first two criteria, the policy states that promotions are awarded based on job, departmental, or plant seniority, or total service. Lopez Dep. Ex. 5 at 14; see also Bechman Aff. ¶ 1; Yarbrough Aff. ¶ 1. IKE employee Morris Hysell testified that promotion was based on seniority, and that when an opening became available, the senior employee was promoted automatically. Lopez also testified that promotion was based on seniority. The line of promotion for non-supervisory positions in the Operations Department is (1) utility operator, (2) Auxiliary Equipment Operator, and (3) Equipment Operator.

Under the company policy, qualified employees who have received requisite training may be assigned to "step up" to perform higher-ranking positions in the place of absent employees, and such assignments are granted based on seniority. See Lopez Dep. Ex. 5 at 11-14. IKE EO Curtis Yarbrough testified that one who "works in the Stepped up E.O. classification" earns both a higher wage and credit toward qualifying for the next pay rate as an EO, which becomes a fixed higher salary for that employee. Yarbrough also testified that there are four to five levels of potential fixed higher pay for the EO position that an AEO may qualify for by working as a stepped up EO.

Training for promotion and/or step up includes study of a training manual and the completion of questionnaires at the end of each chapter that must be approved by one's supervisor. Lopez received a copy of the EO training manual

in 1996 while still a utility operator, and he reviewed the manual from 1997 through 2000. An employee must also complete successfully several "demonstrations" for promotion. Additionally, AEOs normally receive 14 days of control room training before promotion to an EO position.

Lopez completed the training manual and his supervisors Art Clark and Danny Sexton had signed off on several sections by February 23, 2000. Henry Mattick, Shift Operating Engineer ("SOE") on B shift after Reed retired, signed a form in April 2000 stating that Lopez had "satisfactorily demonstrated . . . an adequate knowledge and skill required for the job classification of [EO]" and authorizing Lopez to work at that classification when needed. Lopez Dep. Ex. 14. Lopez testified that after he was "stepping up" by working in the control room in 2000, Mattick called him into his office. Mattick asked Lopez why, despite Reed's note to Mattick that Lopez had finished his training, there was no documentation that Lopez had completed demonstrations. Lopez informed Mattick that, although he asked to perform demonstrations, no one had ever completed such demonstrations with him.

Lopez's supervisors completed a form showing that by October 2000, Lopez had successfully completed his EO job training manual, as well as several job demonstrations. Lopez Dep. Exs. 15, 16. The job demonstration booklet states that an employee must perform and/or describe a particular procedure as part of a "demonstration." Lopez Dep. Ex. 15. EO Hysell testified that training employees

should actually perform demonstration tasks, but if such tasks are not scheduled to be performed, or otherwise could not be performed, an employee could describe a procedure orally instead. Lopez testified that EO training demonstrations were commonly carried out in the control room, where the employee could practice skills by repeatedly performing them, but that five of Lopez's six job demonstrations were instead carried out in Mattick's office, where Mattick would ask Lopez to explain orally how to perform certain functions, rather than actually performing them. Lopez testified that as of October 2000, he did not feel qualified for a promotion to an EO position, but felt qualified to step up, and he stepped up over 1000 hours between 1999 and 2002.

After Lopez completed his training and demonstrations, he was qualified for the next available promotion (or step up opportunity) to an EO position. Some EOs and Unit Supervisors, however, complained that Lopez had difficulty remembering procedures.

In June 2002, IKE reorganized and transferred Lopez to D shift where he continued to step up as an EO working under Unit Supervisor Fred Stillwell and SOE Rodney Graves. Graves claims that, after observing Lopez as a stepped up EO, he determined that Lopez lacked the ability to perform the EO tasks. Graves informed Superintendent of Operations Dave Marshall of his concerns and offered Lopez additional training that lasted from August through October 2002.

Lopez testified that as soon as he arrived on D shift, he requested additional training from Graves. According to Lopez, he was unhappy when Graves informed him that Graves was "going to write everything down," about Lopez's training. Lopez complains that the training was too fast, amounted just to "questioning" him, and was generally not satisfactory. Lopez Dep. at 103-04. Lopez believed that IKE management did not document the training of other workers as closely, and he did not know of any other workers who had requested additional training after being considered qualified for step up or promotion to an EO position.

Graves assigned six Unit Supervisors to perform Lopez's additional training. Among the Unit Supervisors, either a training log or performance evaluation was completed regarding Lopez each day. Graves also occasionally completed performance evaluations regarding Lopez's work. Graves testified that despite repeated opportunities to perform various tasks, "Lopez remained unsure and hesitant of performing procedures, and required constant coaching and close attention . . . ." Graves Aff. ¶¶ 10-13, Ex. A. Graves testified that he determined Lopez was unable to perform the EO duties at an acceptable level, failed to retain his training, and did not have the confidence of other workers in performing such duties. Graves testified that he was concerned by this, particularly in light of Lopez's experiences stepping up to the EO position. He testified that he informed Marshall of his concerns. In October 2002, Marshall then disqualified Lopez from eligibility to step up to the EO position, citing lack of ability and safety concerns. Graves and Marshall informed Lopez that they would continue his training.

Lopez testified that the additional training had been too fast and that it was "hardly no training, just questioning." Lopez Dep. at 104. For example, Lopez testified that when Stillwell trained him to "bring a unit down," Stillwell spoke to him about only some of the tasks required to perform this operation, and that when Lopez inquired about other steps of the operation, Stillwell told Lopez: "You will never be able to do that." *Id.* at 104-05, 138-39. Although Lopez believed that those training him wanted to "flunk" him, *id.* at 106-07, he also testified that one of his trainers, Terry Burch, was the best trainer he had ever had, that Burch was patient with him, and that he learned a lot from Burch. *Id.* at 145. Lopez testified that he did not report his dissatisfaction with his training in 2000 because "they thought they were doing it right," though he also testified that there was "malice in their disposition in the training." *Id.* at 111.

Lopez testified that he believed he received inadequate training because he is from Mexico, and because some of his supervisors may have thought that he could not understand certain processes because of his accent. He testified that he once overheard someone say about him: "He won't understand it. Forget that." *Id.* at 108-09. He also testified that in 2002 Dan Murray, a stepped up EO, told Lopez that he could not understand him, and suggested he take English classes. Lopez testified that on three or four occasions, Stillwell made comments stating that anybody who "came up here in 1970 from Mexico . . . should be sent back." *Id.* at 78. He testified that he informed Stillwell that he did not like the comments, and that they "slowed down some." *Id.* at 78-79. Lopez first testified

that he did not report the comments to anyone else at the time, but thought that he might have later reported them. He testified that he did not report the comments because he worried that Stillwell and others would hold it against him, and he wanted to solve his problems within the department.

Lopez filed a grievance with IKE in October 2002. Lopez stated in his grievance that (1) he had been given unfair training; (2) he had been subjected to discrimination; (3) other AEOs were not subjected to the same close monitoring of job performance; (4) he was singled out as an inexperienced person incapable of performing EO operations; (5) Marshall had "stopped" his advancement in the operations department; (6) he had been called a "dumbf***" in his department; and (7) his department "avoided [his] rights of equality and experience." Lopez Dep. Ex. 18. He also wrote in his grievance that such actions had caused him to experience stress and to develop an "inferiority complex." *Id.* Lopez subsequently completed an additional grievance form as well. Lopez Dep. Ex. 19. Lopez testified that he heard coworker John Epperson and Stillwell, who was an EO at the time, call him a "dumbf***" in 1998 or 1999. Lopez Dep. at 159. He also testified that Unit Supervisor Shirre Brandon, with whom Lopez would "kid" around, told him in 1997 or 1998 that he "could not learn." *Id.* at 160-61.

Stillwell denied Lopez's grievance at Step I. Lopez Dep. Ex. 22. Marshall denied Lopez's grievance at Step II. See Lopez Dep. Ex. 20. At Step III, Plant Manager Ray Wilson wrote in his November 2002 denial that Lopez had received

training beyond that normally provided to AEOs, and that his supervisors noted that he had difficulty retaining information and performing skills on his own. Wilson also wrote that because of safety concerns, Lopez would not be permitted to step up until his control room performance improved. Lopez Dep. Ex. 21.

Lopez pursued his grievance to step IV, before Vice President of Operations, David Jones. In meeting with Jones, Lopez requested that he be transferred to shift A. On January 31, 2003, Jones affirmed the company's decision to revoke Lopez's eligibility to step up, but transferred him to shift A to receive additional training, to complete the EO manual again, and to perform the demonstrations necessary for EO training. Lopez Dep. at 181-86, Ex. 23.

Lopez transferred to shift A, where he worked under SOE Robert Chase, in February 2003. Chase assigned Lopez to an AEO position in Unit 3, and assigned Unit Supervisor Joel Breeding to oversee Lopez's training and demonstrations. Stepped up EO Dennis Cole and EO Curtis Yarbrough provided most of Lopez's training. Lopez also received training from EOs Hysell and Pamela Bechman, and Unit Supervisors Robert Sevier and Charlie Vaughn. Lopez testified that these individuals trained him well.

Hysell, an EO who had been employed by IKE since 1990, testified that Lopez was "very knowledgeable," but that he "lack[ed] experience" with the operating equipment. Hysell Dep. at 20. Hysell testified that he taught Lopez

everything an EO should know, that he made sure not to leave anything out of Lopez's training, and that Lopez did a "good job." *Id.* at 25.

Vaughn, who had been employed at IKE since 1980 and worked for several years as an EO and as a Unit Supervisor, testified that he trained Lopez to perform the EO functions of placing a pulverizer in service, removing a pulverizer from service, changing from pressure to suction operation, and changing from suction to pressure operation. Vaughn Dep. at 18. Vaughn testified Lopez's performance was either "good" or "fine" in each of these operations. *Id.*

Yarbrough, an EO who had been employed with IKE since 1986, and Bechman, an EO who had worked at IKE since 1983, testified that Lopez "did a great job" and/or performed "very well" in the following: (1) placing a pulverizer in service; (2) removing a pulverizer from service; (3) changing from suction to pressure operation; and (4) changing from pressure to suction operations. Bechman Aff. ¶ 3; Yarbrough ¶ 3.

Yarbrough, Hysell, Vaughn, and Bechman testified that Lopez demonstrated good knowledge or an understanding of "Boiler Operations" and "Boiler Components." Bechman Aff. ¶ 4; Yarbrough Aff. ¶ 4; Hysell Dep. at 37; Vaughn Dep. at 22. Bechman and Yarbrough testified that Lopez was "qualified" or "more than qualified" to work as a stepped up EO. Yarbrough and Bechman testified that Lopez's ability to perform the stepped up EO functions was "comparable to

any other similarly situated person in the plant" and better than fellow AEO Cathy Courtney. Bechman testified that Courtney "has been allowed to work in the Stepped up position frequently and she has been on training for the last two to three years as Stepped up E.O." Bechman Aff. ¶¶ 4, 5; Yarbrough Aff. ¶ 4.

Yarbrough also testified the stepped up EO position was a "learn as you go" job classification, that "they" (without explaining who "they" were) appeared to want Lopez to have "total and perfect" performance and knowledge of an EO position as a stepped up EO. He testified that he had "never seen anyone go through the type of testing and demonstrations to be qualified to step up as Lopez." Yarbrough Aff. ¶ 7. He also testified that he did not know of anyone else besides Lopez who had been removed from a stepped up EO position. *Id.*

Breeding testified that he observed that Lopez could memorize the procedures, but that he became confused "if anything was out of the ordinary," and that he often lost concentration if asked a question while performing a task. Breeding Aff. ¶¶ 7-8. Breeding also testified that other EOs informed him that Lopez had difficulty performing procedures. *Id.*

Chase testified that he provided Lopez with 28 days of training, while most AEOs receive only 14 days of training. Breeding testified that when he completed Lopez's training, he asked Lopez if he was satisfied, and Lopez stated that he was. Lopez testified that his training went well.

After his training period on A shift, Breeding conducted Lopez's demonstrations, and recorded the results in a Job Demonstrations Book. Breeding evaluated Lopez on the same six demonstrations on which he had previously been evaluated, and also evaluated him on several additional job demonstrations. See Lopez Dep. Exs. 15, 25. Lopez failed some demonstrations, and passed several others. Breeding rated Lopez as "unsatisfactory" in the following areas: (1) placing a pulverizer in service; (2) removing a pulverizer from service; (3) changing from suction to pressure operation; (4) changing from pressure to suction operations; (5) and placing the combustion control in the "hand" or "automatic" positions. Lopez Dep. Exs. 25, 26.

Breeding reported the results to Chase, and informed him that Lopez was not competent to step up as EO. After speaking with other supervisors and EOs who supervised Lopez, Chase determined that Lopez was not qualified to step up to EO positions, and reported his decision to Marshall. A meeting was then held at which Marshall, Wilson, human resource supervisor William Hart, and assistant plant manager Cliff Carnes questioned Breeding regarding Lopez's training and his performance. The group decided that Lopez would not be permitted to step up as an EO, and Chase and Marshall informed Lopez of the decision, but also told him he could train on his own as time allowed.

Lopez believes his testing in September 2003 was unfair. Hysell testified that the task of changing from pressure to suction operations was dangerous and

usually not performed. Lopez testified that Breeding and Chase asked him to perform a demonstration of "swapping mills," which Lopez claims was against the company's operating procedure, and that Breeding "didn't like" him. Lopez Dep. at 88-91. Breeding testified that EOs and AEOs should be qualified to "swap mills." Breeding Aff. ¶¶ 12-15. Chase confirmed that Lopez should have been able to perform the procedure. Breeding failed Lopez in performing the demonstration. Hysell testified that swapping a mill was not a routine procedure, and that Hysell had not been trained or tested on this task. Bechman, Yarbrough, and Hysell testified that "swapping mills" was a task not frequently performed by EOs. Bechman Aff. ¶ 3; Yarbrough Aff. ¶ 3; Hysell Dep. at 29. Lopez also testified that Breeding failed him in a test on suction and pressure operation for "little mistakes," and that Lopez believed that the mistakes were not serious enough to warrant a failure rating. Lopez Dep. at 216-17.

Lopez filed a charge of discrimination with the EEOC on November 5, 2003. Lopez Dep. Ex. 28. The charge states that Lopez was being subjected to national origin discrimination that occurred between January and August 2003. *Id.*

Bechman testified that Breeding talked to Lopez in a gruff and abrasive tone of voice approximately 20% of the time, and that based on this observation, she believed Breeding "disliked" Lopez. Bechman Aff. ¶ 7. Bechman also testified that females and minorities were not well-liked at IKE, but that no female was treated as badly as Lopez. *Id.* ¶ 8. Several of Lopez's co-workers testified that it was

generally known at IKE that Lopez was Mexican, that he was the only person of Mexican descent, and that Lopez's English was understandable, but that he had a distinct accent. *Id.* ¶ 9; Yarbrough Aff. ¶ 9; Hysell Dep. at 37-39.

On August 12, 2004, Lopez filed his complaint in this action alleging that IKE violated his rights under both Title VII and § 1981 by discriminating against him based on race and national origin and by retaliating against him for engaging protected activities.

Discussion

I. *Threshold Issues*

A. *Timeliness*

1. *Title VII Claims*

IKE first argues that several claims are untimely. Title VII requires a plaintiff in a deferral state, such as Indiana, to file a charge of discrimination with the EEOC or equivalent state agency within 300 days after the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1); *Sharp v. United Airlines, Inc.*, 236 F.3d 368, 372 (7th Cir. 2001); *Risk v. Ford Motor Co.*, 48 F. Supp. 2d 1135, 1140 (S.D. Ind. 1999). Lopez filed his EEOC charge on November 5, 2003. A period of 300 days preceding Lopez's EEOC charge commenced on or about January 9, 2003. Any claim Lopez may bring based on discrimination or

retaliation occurring after this date is timely and, if otherwise permissible under relevant law, Lopez may proceed on such a claim.

The issue is whether Lopez's discrimination claims based on events that took place before this date are timely. Where an employee's claim is based on a single discrete act, such as termination, failure to promote, or the denial of a transfer, the Supreme Court has instructed that courts should strictly construe the time requirement, finding a claim timely where the violation itself, not just acts related to the violation, occurred within the actionable time period. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 109, 112-14 (2002) ("discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges"); *Tinner v. United Insurance Co. of America*, 308 F.3d 697, 708 (7th Cir. 2002) ("if the employee knew, or with the exercise of reasonable diligence should have known that each act, once completed, was discriminatory, the employee must sue upon that act within the relevant statutory period").[1] A hostile environment claim, however, is timely where any act upon which the claim is based occurs within the relevant time period. See *Morgan*, 536 U.S. at 115-16.

Lopez argues that the events at issue in this case are not the kind of discrete acts that trigger separate limitations periods. Rather, Lopez claims that

[1]The statute does not, however, bar an employee from using prior time-barred acts as background evidence to support a timely claim. *Morgan*, 536 U.S. at 113.

IKE operated under a covert practice of discrimination, preventing him from advancing beyond an AEO position, and that therefore all actions "related to" preventing his advancement are actionable. Pl. Br. at 16. To the extent Lopez seeks to extend the limitations period based on the on the relation between the timely and untimely discrete events, *Morgan* made clear that this approach will not work. 536 U.S. at 112-14. Also, Lopez has shown no evidence that would support a theory of equitable tolling.

Lopez has also offered no evidence that he was given inadequate training during the limitations period, January 2003 or thereafter. The only evidence presented tends to show that Lopez was satisfied with this later training. Because Lopez's inadequate training Title VII claim therefore rests on discrete acts that occurred outside the limitations period, this claim is untimely.

Lopez also claims that his eligibility for promotion or EO step up responsibilities was revoked because of his race and national origin in violation of Title VII. He argues the 1997 training of the less-senior Lynch, IKE's alleged unreasonable expectations, and evidence that he could adequately perform tasks on which he was given an unsatisfactory rating support this argument. Lopez was made eligible to step up in 2000. After Lopez's transfer to D shift and additional EO training from August through October 2002, Marshall formally revoked Lopez's eligibility for step up or promotion to the EO position in writing on October 4, 2002. See Lopez Dep. Ex. 17. Lopez appealed this decision via the company's

grievance process, and Jones agreed with the revocation of Lopez's step up classification at Step IV of the process on January 31, 2003. Lopez Dep. Ex. 23. Although Jones' decision occurred within the limitations period, the act at issue in Lopez's Title VII claim, revocation of his eligibility for step up or promotion to the EO position, occurred outside the limitations period, rendering this claim time barred as well. This scenario is similar to that in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which the Supreme Court held that the plaintiff's claim for denial of tenure was untimely. Although the denial of his appeal through university grievance procedure and subsequent termination took place within the limitations period, the Court reasoned that the "proper focus is upon the time of the *discriminatory acts*," not on their effects. 449 U.S. at 258, citing *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979).

Lopez also advances a Title VII claim that he was subjected to discriminatory testing in that he was required to perform some functions that were either dangerous or infrequently used, and that he was held to a higher standard of performance than others. This claim is timely to the extent that it is based on testing that took place during the limitations period in 2003.

Lopez also advances a hostile environment claim. "A charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Morgan*, 536 U.S. at 122. Even

viewing the evidence in a light most favorable to Lopez, he fails to point to any specific acts upon which his hostile environment claim is based that occurred within the 300-day limitations period preceding his EEOC charge. This claim is also time-barred.

2. *Section 1981 Claims*

Lopez advances identical claims of race discrimination under both Title VII and § 1981. Section 1981 is governed by the four-year statute of limitations contained in 28 U.S.C. § 1658. *Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369 (2004). Defendant also argues that some of the actions at issue in this case took place outside of the four-year period. The rule articulated in *Morgan*, which precludes recovery for discrete acts occurring outside the limitations period but permits consideration of the entire scope of a hostile environment claim where at least one act upon which the claim is based occurred within the limitations period, applies to § 1981 claims as well. *Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 270 (7th Cir. 2004) (continuing violation doctrine articulated in *Morgan* applies to § 1981). Lopez filed his complaint in this court on August 12, 2004.

Lopez's inadequate training, disqualification, and discriminatory testing claims are timely under § 1981 to the extent that they are based on actions that occurred after August 12, 2000. Viewing the evidence in the light most favorable to Lopez on summary judgment, at least some of the events relevant to Lopez's

hostile environment claim, including comments by Murray and Stillwell, appear to have taken place within this four-year period. Accordingly, Lopez's § 1981 hostile environment claim is timely as well.

B. *Relation to the EEOC Charge*

A Title VII plaintiff may not bring claims in a lawsuit that exceed the scope of the plaintiff's EEOC charge. See 42 U.S.C. § 2000e–5(b) & (f); *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 202 (7th Cir. 1996). This statutory requirement to file a charge (which does not apply to § 1981 claims) puts the employer on notice of the charges while also affording the EEOC and the employer the opportunity to settle the dispute between the parties. *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1110 (7th Cir. 1992). If the claims in the lawsuit are "like or reasonably related" to the allegations in the EEOC charge and could reasonably be expected to grow out of the EEOC's investigation of the original charge, the claim may be considered within the scope of the charge. *Ezell v. Potter*, 400 F.3d 1041, 1046 (7th Cir. 2005); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 864 (7th Cir. 1985). This standard is a liberal one, designed to accomplish the remedial purpose of Title VII, which often depends on charges filed by employees without attorneys for its enforcement. *Babrocky*, 773 F.2d at 864.

Lopez filed a charge of discrimination with the EEOC November 5, 2003. Lopez Dep. Ex. 28. His charge states that he was being subjected to national

origin discrimination that occurred between January and August 2003. The charge describes what Lopez believed to be unlawful discrimination:

> In Early 2003 Superintendent of Operations, David Marshall, informed me that I was not considered eligible to progress to the position of Equipment Operator. I disagreed and advised Mr. Marshall that I had not been provided proper training in 1998. Consequently I was moved from D shift to A shift and trained by Supervisor, Joel Breeding. Around August 2003, Mr. Breeding tested me unfairly and Cathy Courtney was promoted over me, even though she has less seniority. I believe that Mr. Breeding did not test me in the manner that non-Hispanic employees are tested. I also believe that Mr. Breeding predetermined the results of the test beforehand.

Id. Lopez did not check the boxes indicating that he was alleging race discrimination or retaliation. *Id.* IKE argues that Lopez's Title VII hostile environment and retaliation claims exceed the scope of his EEOC charge and are therefore not actionable. Normally, retaliation, discrimination, and harassment claims are not sufficiently related to one another to permit an EEOC charge of one to support a civil suit for another. See *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994). An exception exists, however, where such claims are so connected in terms of time, people, and substance that to ignore the connection would undermine the remedial purpose of Title VII in favor of an overly technical application of the law. *Sitar v. Indiana Dep't of Transportation*, 344 F.3d 720, 726-27 (7th Cir. 2003).[2]

[2]Another exception is that a complainant need not file a new EEOC charge of discrimination to complain that the defendant retaliated against him for filing the first EEOC charge. *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 482 (7th Cir. 1996).

Lopez's EEOC charge makes no mention of any hostile environment claim based on race or national origin. Lopez claims that the evidence relevant to his hostile environment claim includes testimony regarding comments and name calling to which he was subjected, his supervisors' and co-workers' "perception" of him, and emotional stress he claims to have suffered as a result. None of the individuals implicated in the evidence before the court on this claim, including Stillwell, Brandon, Murray, and Epperson, were mentioned in the EEOC charge. Several of the events on which the hostile environment claim was based took place outside the time frame referenced in the charge. The charge fails to mention any actions related to Lopez's hostile environment claim. With virtually no factual overlap between the hostile environment claim and the EEOC charge, the charge could not reasonably be expected either to put IKE on notice or to lead to discovery of a hostile environment claim upon investigation. See *Sitar*, 344 F.3d at 726-27 (sexual harassment and sex discrimination claims found not reasonably related to retaliation claim alleged in EEOC charge where harassment claim involved "a separate set of incidents, conduct, and people," and was distant in time from the events at issue); *Peabody Coal Co.*, 97 F.3d at 202-03; *Cheek v. Western and Southern Life Insurance Co.*, 31 F.3d at 503 (normally, harassment claim cannot reasonably be inferred from EEOC charge claiming discrimination). Accordingly, even if Lopez's Title VII hostile environment claim were not time-barred, his failure to raise the issue before the EEOC also bars the claim.

Lopez's only timely retaliation claim under Title VII is for unfair testing by Breeding in 2003, who required Lopez to perform demonstrations on several more job functions than on his 2000 demonstration test.[3] The charge refers to Lopez's complaints of inadequate training, the revocation of his step up qualification, and subsequent testing in 2003. "Claims are reasonably related if there is a factual relationship between them." *Ezell*, 400 F.3d at 1046. Applying the liberal standard established by the Seventh Circuit, the factual overlap between the retaliation claim and the EEOC charge renders the allegations reasonably related to one another. Investigation of the EEOC charge would likely reveal Lopez's retaliation claim of unfair testing after he filed his company grievance.

Lopez's Title VII unfair testing race discrimination claim was also within the scope of the EEOC charge, which explicitly stated that Lopez believed he was tested in a manner different from testing administered to non-Hispanic employees. Although Lopez did not "mark the box" indicating a charge of race discrimination, the plain language of the charge would have been sufficient to both put IKE on notice and reasonably lead an investigation of the charge to his race discrimination claim.

[3]Lopez also claims that IKE unlawfully retaliated against him by sending him to D shift where he received poor training. Because Lopez was sent to D shift and received his training there in 2002, this claim is time barred.

C. *Race and National Origin*

The differences between Title VII and 42 U.S.C. § 1981 are important here, since Lopez has failed to comply with deadlines and administrative requirements for Title VII claims that do not apply under § 1981. One additional threshold issue is the basis of the alleged discrimination against Lopez on the basis of national origin and his Hispanic identity. Title VII prohibits discrimination based on race and national origin, among other grounds. Section 1981 is written in terms of race (giving all persons the same rights as "enjoyed by white citizens") but does not specifically address national origin. See *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 756-57 (7th Cir. 2006). The Supreme Court has resolved the issue by interpreting the term "race" broadly under § 1981 to include identifiable classes of persons who are victims of intentional discrimination because of their ancestry or ethnic characteristics. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (explaining that the concept of "race" is broad within the meaning of § 1981, relying on legislative history and common use of language at time statute was enacted, and extending to matters of ancestry commonly associated with nationality and ethnicity, not race in a more modern sense); *Pourghoraishi*, 449 F.3d at 756. Accordingly, Lopez may pursue his claims of national origin and ethnic discrimination under § 1981.

II. *Merits of Surviving Claims*

Lopez claims that IKE discriminated against him by (1) providing him with inadequate training for step up to EO; (2) disqualifying him from step up eligibility to an EO position in 2002; and (3) subjecting him to discriminatory testing of his ability to perform the EO tasks in 2003. Section 1981 prohibits racial discrimination in the creation and enforcement of contracts, which has been interpreted to apply to employment relationships such as that at issue. The applicable legal standards on liability for race discrimination are the same under Title VII and § 1981. *Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 299 (7th Cir. 2004); *Williams v. Waste Management of Illinois, Inc.*, 361 F.3d 1021, 1028 (7th Cir. 2004).

A plaintiff may prove claims of race (or national origin) discrimination using either the direct or indirect methods of proof. *Hague v. Thompson Distribution Co.*, 436 F.3d 816, 820 (7th Cir. 2006). Lopez has presented his claims using the indirect method, which applies the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This requires the plaintiff to first establish the following elements of the prima facie case of discrimination: (1) the plaintiff was a member of a protected class; (2) he was meeting the employer's legitimate performance expectations; (3) he was subjected to a materially adverse employment action; and (4) similarly situated individuals outside the protected class were treated more favorably. *Bio v. Federal Express Corp.*, 424 F.3d 593, 596 (7th Cir. 2005); *Hague*, 436 F.3d at 820; *Dandy*,

388 F.3d at 273. If the plaintiff shows a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the actions. If it does so, the burden shifts back to the plaintiff to show that the defendant's stated reason is a pretext for discrimination. *Bio*, 424 F.3d at 596.

A. *Inadequate Training*

Lopez claims that IKE discriminated against him because of his race or nationality by giving him discriminatory or unequal training in violation of § 1981. Lopez's brief argument on this claim states that IKE "rushed" him through what should have been an incremental training process and thus IKE failed to provide him with the "opportunity to grow and mature into" an EO position. Pl. Br. at 17.

Lopez has not offered either evidence or argument that he was treated less favorably than a similarly situated individual outside his protected class, failing to raise a genuine issue of fact as to the fourth element of his prima facie case. See *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692-94 (7th Cir. 2005) (affirming summary judgment where plaintiff failed to demonstrate fourth element of prima facie case); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 979 (2004) (affirming summary judgment where plaintiff failed to meet her burden as to the third or fourth elements of her prima facie case of an inadequate training sex discrimination claim).[4]

[4]IKE has argued that this claim should be analyzed using the framework (continued...)

Nevertheless, as useful as the dichotomy between direct and indirect proof may be in analyzing employment discrimination cases, there is a danger of losing sight of the forest for the trees. That danger is present in this case. The number of incidents and the amount of time involved mean that if the court focuses too tightly on one particular incident or issue, it can lose sight of other related evidence that sheds light on that incident or issue and on the motives of the key actors. Lopez has come forward with sufficient evidence of a combination or "mosaic" of circumstantial evidence to support this claim. See, *e.g.*, *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736-37 (7th Cir. 1994) (describing this "mosaic" form of proof, as including comments by supervisors, suspicious timing, inconsistent explanations of behavior, and the like). Where the plaintiff does not have evidence that amounts to a virtual admission of unlawful intent, rigid reliance on the indirect method of proof can lead the court to reject claims even where there is significant circumstantial evidence of discrimination. That's the point of *Troupe* and the other cases applying the mosaic approach. See, *e.g.*, *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir.1997) (reversing summary judgment for employer; "remarks and other evidence that reflect a propensity by

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[4](...continued)
provided by the Seventh Circuit for "failure to train" cases, which requires the plaintiff to demonstrate that (1) he is a member of a protected class, (2) the defendant offered training to its employees, (3) plaintiff was eligible for training, and (4) plaintiff was not provided training under circumstances giving rise to an inference of discrimination, meaning that he was denied training offered to similarly situated employees outside his protected class. *Malacara v. City of Madison*, 224 F.3d 727, 729 (7th Cir. 2000). Plaintiff does not argue that he was denied training, but instead argues that he was provided inadequate training, a claim that the Seventh Circuit analyzed using the traditional *McDonnell Douglas* elements in *Wyninger*. See 361 F.3d at 978-79.

the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality"); *Ballard v. Potter*, 2002 WL 31045359, *3 (S.D. Ind. Aug. 28, 2002) (denying summary judgment where plaintiff came forward with evidence that supervisors took actions regarding plaintiff that were inconsistent with the applicable collective bargaining agreement and inconsistent with their treatment of other employees).

In this case, even though Lopez cannot identify a good comparator, he has come forward with circumstantial evidence that could allow a reasonable jury to find in his favor on his claim of inadequate training under § 1981. This mosaic includes evidence of the differences between the training for him and the training for other employees, in an atmosphere of some animosity or disdain toward Lopez because of his national origin and his accent with spoken English. The evidence also includes the evidence of different testing, discussed below. IKE is not entitled to summary judgment on this claim.

B. *Disqualification from Eligibility for "Step Up" to EO*

Lopez also advances a § 1981 claim that IKE discriminated against him because of his race by disqualifying him from eligibility for step up or promotion to an EO position in 2002. IKE argues that Lopez has failed to raise a genuine issue of fact as to whether he was performing in accordance with IKE's legitimate expectations, and as to whether he was treated less favorably than a similarly

situated individual outside the protected class, the second and fourth elements of his prima facie case.

Lopez has demonstrated a genuine issue of fact as to whether he was performing within IKE's expectations as a stepped up EO when his qualification was revoked. IKE has presented evidence that Graves and other supervisors believed after observing Lopez that he lacked the ability to perform the duties of an EO. This assertion is supported by Lopez's testimony that he independently requested additional training from Graves once assigned to D shift. A genuine issue of fact exists, however, in light of other evidence that Mattick and other supervisors considered Lopez qualified for step up to the EO position, and that he was permitted to step up for approximately two years and for over one thousand hours. In light of this conflicting evidence, IKE has not established beyond reasonable dispute that Lopez was not performing within IKE's legitimate expectations for a step up EO as a matter of law.

Lopez has also raised a genuine issue of material fact as to whether he was similarly situated to an employee outside of his protected class, Cathy Courtney, who was treated more favorably. Similarly situated employees need not be completely identical to Lopez, but must be "directly comparable to him in all material aspects." *Herron*, 388 F.3d at 300-01, quoting *Grayson v. O'Neill*, 308 F.3d 808, 819 (2002). In determining whether two employees are similarly situated, the court must consider all of the relevant factors, which may include

whether the employees held the same job, were subject to the same standards, were subordinate to the same supervisor, and had comparable experience, education, and qualifications, if the employer took those latter factors into account. *Bio*, 424 F.3d at 597; *Franklin v. City of Evanston*, 384 F.3d 838, 847 (7th Cir. 2004).

Courtney, like Lopez, was an AEO. Bechman, who provided EO training to Lopez testified that Lopez's performance of stepped up EO duties was better than that of Courtney's, that Courtney had "frequently" been permitted to step up, and that Courtney had been on training for two or three years as a stepped up EO. Bechman Aff. ¶ 5. The evidence demonstrates that Courtney and Lopez held the same title, that they each performed the duty of a stepped up EO, that at least one trainer observed that Courtney was not as capable as Lopez, but was nonetheless permitted to step up after Lopez's qualification was revoked. Lopez need not show that he and Courtney were identical, but he must raise an issue as to whether they were similar in the aspects relevant on this claim. *Herron*, 388 F.3d at 300-01. Lopez has met his burden under the prima facie case on this claim.

Once a plaintiff has established a prima facie case of discrimination, a "rebuttable presumption of discrimination" arises, shifting the burden "to the employer to articulate a legitimate, nondiscriminatory reason" for its actions. *Johnson v. City of Fort Wayne*, 91 F.3d 922, 931 (7th Cir. 1996). If the employer meets this burden, the presumption disappears. *Id.* The burden then shifts back

to the plaintiff to offer evidence sufficient to permit a reasonable jury to find that these reasons were a pretext, which in turn may allow an inference of discriminatory intent. *Bio*, 424 F.3d at 596; *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 867 (7th Cir. 2005); see *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, 511 (1993). A plaintiff demonstrates that a given reason is pretext by showing that the defendant's stated reason was likely motivated by a discriminatory intent or that the defendant's stated reason is not worthy of credence. *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (7th Cir. 2002); accord, *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 418 (7th Cir. 2006) (clarifying standard to focus on honesty of defendant's stated reason rather than its "sufficiency"); *Alexander v. Wisconsin Dep't of Health and Family Services*, 263 F.3d 673, 682-83 (7th Cir. 2001).

IKE advances as its reason for revoking Lopez's qualification that IKE management no longer viewed Lopez as qualified to perform EO duties, and that as a result, allowing him to continue stepping up would pose a threat to plant safety and productivity. Lopez has offered evidence that he was qualified for the position, and that at certain times during his employment, IKE viewed him as qualified for the position as well. As discussed earlier, the parties have offered conflicting evidence regarding Lopez's capacity to step up as an EO. Defendant points out correctly that Lopez's own opinion alone that he was qualified to step up is not sufficient to establish pretext. See *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986).

Lopez has offered far more than his own opinion. IKE considered Lopez qualified to step up in 2000, and Lopez performed over 1000 hours of work as a stepped up EO until 2002. Additionally, Lopez has offered Yarbrough's affidavit testimony that Lopez's knowledge of the step up EO duties "was better than most other" AEOs, and Bechman's testimony that Lopez's performance as a stepped up EO was "comparable to any other similarly situated person in the plant." Yarbrough Aff. ¶ 5; Bechman Aff. ¶ 5. In light of the company's contradictory actions and the conflict in the evidence regarding Lopez's ability, there exists a genuine issue of fact as to whether IKE's reason for revoking Lopez's step up qualification was pretexual. This claim, therefore, presents issues that a jury will need to decide.

C. *Unfair Testing*

Lopez also claims that he was subjected to unfair testing by Breeding in 2003. Lopez claims that Breeding tested him on job demonstrations that were not appropriate for an EO position and wrongly rated him as unsatisfactory in performing other job demonstrations. Lopez argues that he should not have been tested on the task of "swapping mills." He points to Hysell's testimony that such a task was not routinely performed and that Hysell himself had neither been trained nor tested on this skill. Lopez also argues that he should not have been tested on the job demonstration of changing from pressure to suction operation because the task was not routinely performed and was dangerous.

Lopez cannot satisfy all the requirements of the indirect method of proof because he has not offered evidence of a similarly situated individual with respect to his discriminatory testing claim. Similarly situated individuals must be comparable to the plaintiff in all relevant aspects, which as earlier discussed, requires the court to consider relevant factors, such as whether the employees held the same position, were subordinate to the same supervisor, or any other relevant characteristic. *Ineichen v. Ameritech*, 410 F.3d 956, 960-61 (7th Cir. 2005). Although Yarbrough testified that he had not seen anyone else go through the kind of testing that Lopez was required to complete, there is no evidence that Yarbrough was present for or otherwise had knowledge of Breeding's evaluation of Lopez. Additionally, although Hysell testified that he was not originally tested on "swapping mills," Lopez has offered no evidence as to who performed Hysell's testing, and when it occurred. Additionally, IKE has offered evidence that Courtney was tested on the same additional skills detailed in the manual on which Breeding tested Lopez, see Hart Aff. ¶¶ 4,5, Ex. A, and Lopez has offered no evidence as to whether Courtney was tested on "swapping mills." Without such evidence, no jury could determine that Lopez was either similarly situated to Courtney and Hysell, or treated more favorably than Courtney, with respect to testing.

At the same time, the court concludes that Lopez has come forward with a sufficient "mosaic" of circumstantial evidence of discrimination, as with his claim for inadequate training. The evidence includes the way IKE disqualified him from

working as a step-up EO, as well as evidence indicating that Lopez's testing was tougher than testing for a number of other employees, whether they were directly comparable or not. The evidence also includes evidence of hostility toward Lopez's national origin and his accent. The court recognizes that it is not the job of a reviewing court to sit as a super-personnel department judging the wisdom of the employer's actions. *Jones v. Union Pacific Railroad Co.*, 302 F.3d 735, 745 (7th Cir. 2002). Nevertheless, Lopez has come forward with evidence of ethnic hostility and disparate treatment in a number of different respects. The court cannot say that no reasonable jury could find discriminatory intent in this case, at least when the evidence is viewed through the generous lens of a summary judgment motion. Accordingly, IKE's motion for summary judgment on Lopez's unfair testing claim must be denied.

D. *Hostile Environment*

Lopez has advanced a timely claim that IKE subjected him to a racially hostile work environment in violation of § 1981, with its broad definition of race as including national origin. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 756-57 (7th Cir. 2006).[5] To prove a claim for a racially hostile work environment, a plaintiff must show: (a) he was subject to unwelcome harassment; (b) the harassment was

[5]As discussed earlier, Lopez's Title VII hostile environment claim is untimely. The standard that a plaintiff must meet for a hostile environment claim is the same under either statute. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 475-76 (7th Cir. 2004).

based on his race; (c) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and to create a subjectively and objectively hostile or abusive working environment; and (d) there is a basis for employer liability. *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 475-76 (7th Cir. 2004); *Dandy*, 388 F.3d at 271; *Herron*, 388 F.3d at 302.

Lopez has offered evidence relevant to his hostile environment claim, including the overheard comment between Epperson and Stillwell in 1997 or 1998, Brandon's alleged statement around the same period that Lopez "could not learn," and Murray's 2002 comments about his grasp of English. Lopez has also testified that Stillwell both told him he would "never" be able to perform certain tasks and three or four times commented that anyone who came from Mexico should return. Lopez also bases this claim on additional evidence, including: (1) evidence that although Lopez began applying for employment at IKE, he was not hired until 1991, (2) 1997 EO training of less senior Lynch before Lopez, and (3) evidence of training without demonstrations between 1997 and 2000. Lopez claims that, as a result of what he characterizes as IKE management's treating him as though he were incapable, he suffered depression and an inferiority complex.

Although Lopez claims that he found some of the actions and comments made by co-workers and supervisors at IKE subjectively hostile, the evidence does not raise an issue of fact as to whether his work environment was objectively

hostile. In considering objective hostility, the court considers (1) frequency of the harassing conduct, (2) the severity of the conduct, (3) whether the conduct at issue is "physically threatening or humiliating, or a mere offensive utterance," and (4) the extent to which the conduct unreasonably interferes with the plaintiff's ability to perform his job. *Dandy*, 388 F.3d at 271. The evidence demonstrates that Lopez was subjected to a handful of negative or offensive utterances over the course of a number of years. This evidence does not rise to the level of objective hostility, even when considered with Lopez's attempts to recycle his disparate treatment claims into a hostile environment claim. See *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995) ("A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage."); see also *Ezell*, 400 F.3d at 1048 (evidence of supervisor's rude comments reflecting ignorant stereotypes of male, older, and Caucasian workers insufficient to defeat summary judgment on hostile environment claim); *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713-14 (7th Cir. 2004) (isolated events, including offensive comments that were neither physically threatening nor humiliating insufficient to demonstrate an issue of fact on plaintiff's hostile work environment claim); cf. *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1046 (7th Cir. 2002) (vacating summary judgment on plaintiff's racially hostile environment claim where plaintiff was subject to direct, repeated, and highly offensive epithets by employees and supervisors, his car tires were slashed, racist epithets and slogans were painted on bathroom walls, and employees openly touted the KKK and White Power.).

At the same time, the evidence concerning Lopez's working environment is part of the mosaic of circumstantial evidence that supports his more traditional disparate treatment claims concerning training, testing, and job assignments, and his retaliation claim under Title VII. The court has considered that evidence in concluding that Lopez has come forward with sufficient evidence to survive summary judgment on those claims.

E. *Retaliation*

Lopez also argues that IKE retaliated against him for reporting discrimination in violation of Title VII.[6] To demonstrate a prima facie case of retaliation under the indirect method, the plaintiff must come forward with evidence that (1) he engaged in a protected activity; (2) he was performing his job in accordance with his employer's reasonable expectations; (3) he suffered a materially adverse action; and (4) he was treated less favorably than similarly situated employees who did not engage in the protected activity. See *Burlington Northern & Santa Fe Ry. v. White*, — U.S. —, 126 S. Ct. 2405, 2415 (2006) (rejecting requirement that adverse action be employment action and requiring plaintiff to show that reasonable employee would have found challenged action sufficient to dissuade a reasonable worker from making or supporting a charge of discrimination); *Tomanovich v. City of Indianapolis*, — F.3d —, 2006 WL 2256922, *5 (7th Cir. Aug. 8, 2006); *Beamon v. Marshall & Ilsey Trust Co.*, 411 F.3d 854,

[6]The Seventh Circuit does not recognize a claim for retaliation under § 1981. *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866 (7th Cir. 2005).

861-62 (7th Cir. 2005); *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 644 (7th Cir. 2000).

If the plaintiff establishes this prima facie case, the burden shifts to the defendant to advance a legitimate non-retaliatory reason for the adverse employment action. Once the defendant has done so, the burden shifts back to the plaintiff to show that the defendant's given reason is a pretext for retaliation. *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465 (7th Cir. 2002). If the plaintiff fails to raise a genuine issue of fact as to any element of the prima facie case, or as to whether the defendant's reason is pretextual, his retaliation claim cannot survive summary judgment. *Id.*

Lopez filed a grievance with the company following the revocation of his qualification to step up to EO in October 2002. Lopez argues that Breeding subjected him to unfair testing of job demonstrations in 2003 in that he was tested on additional non-routine procedures, and that Breeding judged his performance too harshly. Lopez points to the evidence that while he was tested on only six job demonstrations in 2000, Breeding tested him on an additional twelve job demonstrations in 2003. Lopez Dep. Exs. 15, 25. IKE has offered evidence, however, that other employees were tested on the same additional procedures on which Breeding tested Lopez. See Hart Aff. ¶¶ 4-5.

Lopez also claims that Breeding tested him on functions that "other persons had not been exposed to as part of their training and advancement" to step-up EO positions. Pl. Br. at 22. Apparently Lopez is referring to Breeding testing him on "swapping mills," which Hysell testified that he had not been trained or tested on as part of his advancement to EO. Chase confirmed that Lopez should have been able to perform the procedure. Breeding failed Lopez in performing the demonstration. Hysell testified that swapping a mill was not a routine procedure, and that Hysell had not been trained or tested on this task. Bechman, Yarbrough, and Hysell testified that "swapping mills" was a task EOs did not frequently perform. Lopez testified, however, that EOs performed the task.

Lopez also argues that he was evaluated too harshly by Breeding. Breeding rated Lopez as "unsatisfactory" in the following areas: (1) placing a pulverizer in service; (2) removing a pulverizer from service; (3) changing from suction to pressure operation; (4) changing from pressure to suction operations; (5) and placing the combustion control in the "hand" or "automatic" positions. Lopez Dep. Exs. 25, 26. Breeding testified that he observed that Lopez could memorize the procedures, but that he became confused "if anything was out of the ordinary," that he often lost concentration if asked a question while performing a task, and that other EOs reported that Lopez had difficulty performing procedures. Breeding Aff. ¶¶ 7-8. Lopez testified that although he made some "little" mistakes, he felt the mistakes were not serious enough to warrant an "unsatisfactory" rating. Lopez Dep. at 216-17. He also offered evidence from his trainers on A

shift stating that he performed EO duties well and that Lopez was qualified to work as a stepped up EO. Yarbrough testified that he had never seen anyone go through the kind of training and testing that Lopez was required to complete, and that the EO step up qualification was a "learn as you go" pursuit. Yarbrough Aff. ¶ 7.

As with Lopez's substantive claims of race and national origin discrimination, the court concludes that Lopez has come forward with sufficient circumstantial evidence of differential treatment that would allow a jury to conclude that IKE acted with retaliatory intent.

Conclusion

For the foregoing reasons, IKE's motion for summary judgment (Docket No. 29) is hereby denied as to Lopez's § 1981 claims that IKE discriminated against him by providing inadequate training, by revoking his qualification to step up as an EO, and by subjecting him to stricter testing, and his Title VII claim for retaliation by subjecting him to stricter testing. IKE's motion for summary judgment is granted as to all other claims.

So ordered.

Date: August 17, 2006

DAVID F. HAMILTON, JUDGE
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